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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARBARA A. DE BUONO, MD., in her capacity as New York State Commissioner of Health; KAREN SCHIMKE in her capacity as New York State Executive Deputy Commissioner of Health; DEPUTY DIRECTOR, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS, and PETER VICKERS,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of approximately 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee

benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

NELA is qualified to brief the Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving ERISA and other employment laws, including among others, *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

NELA members' clients and other participants in pension and welfare plans depend on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq*. Contrary to its original purpose of safeguarding employee benefits, ERISA through its preemptive effect has been used to deprive employees of rights they previously enjoyed under state law while failing to provide any comparable federal remedies. The proliferation of ERISA preemption cases raises the question of whether ERISA is having an effect contrary to that intended by those who favored its adoption. To achieve uniform administration of employee benefit plans, ERISA preemption need only be used as a shield, not as a sword.[1/]

This case, along with other ERISA preemption cases

[1/] *See Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996) ("an employer may not use its ERISA plan as a 'gimmick' to trigger preemption and thereby avoid litigation in state court. In the classic metaphor, ERISA preemption may be used as a shield but not as a sword." (citations omitted)).

currently pending before the Court,[2/] presents the Court with the opportunity to establish a more workable framework for the lower courts to use for analyzing ERISA preemption cases. In particular, the lower courts need a more precise test for determining the boundaries of the phrase "relates to an employee benefit plan."

The decision in this case will have a direct and vital bearing on the economic security of NELA members' clients and other participants of pension and welfare plans. In light of the significance of the issues presented by this case, NELA respectfully submits this brief *amicus curiae*.[3/]

SUMMARY OF ARGUMENT

The number of cases the Court has decided construing the phrase "relates to an employee benefit plan" in ERISA's preemption clause illustrates the lower courts' struggle to define the limits of "relates to."[4/] As this Court has recognized, this clause is not a model of legislative drafting, and it has been difficult to provide clear guidance to the lower courts to demarcate the limits

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[2/] *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1415 (U.S., Apr. 15, 1996) (No. 95-789) (whether ERISA preempts state prevailing wage laws); *Boggs v. Boggs*, 89 F.3d 1169 (5th Cir.), *cert. granted*, 65 USLW 3332 (U.S., Nov. 1, 1996) (No. 96-79) (whether ERISA preempts state community property laws).

[3/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[4/] *E.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Mackey v. Lanier Collection Agency Service*, 486 U.S. 825 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

of this clause.[3/] Hence, not only has development of a uniform framework to analyze ERISA preemption been frustrated, but the courts have been flooded with removed cases and preemption claims.

NELA suggests the following framework to use in analyzing ERISA preemption claims.[4/] First, where a state law directly conflicts with ERISA, the state law is preempted by ERISA. *See, e.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Second, if a claim can be brought under ERISA § 502(a), then the state law action must be preempted under ERISA § 514(a). *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Third, if the state law is not in direct conflict with ERISA or a claim cannot be brought under ERISA § 502(a), then it must be determined if that state law specifically refers to an ERISA plan; if so, it is preempted. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. ("Travelers")*, 115 S. Ct. 1671, 1677 (1995); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 841 (1988). Fourth, if the state law does not directly reference an ERISA plan, it is presumed that a state

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3/ *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Ins. Co.*, 115 S. Ct. 1671, 1676 (1995).

4/ ERISA preemption analysis involves numerous steps. The initial inquiries under ERISA § 514(a) are whether a State, state law and an employee benefit plan are involved. ERISA §§ 514(c)(1) & (c)(2), 29 U.S.C. §§ 1144(c)(1) & (c)(2). If any one of these inquiries is negative, there can be no preemption. *See Massachusetts v. Morash*, 490 U.S. 107 (1989) (vacation payments from an employer's general assets did not constitute a plan and therefore state law cannot be preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (a state law requiring a one-time severance payment was not preempted because there was no plan due to a lack of an ongoing scheme or administrative structure). Here, none of the parties dispute that a State, state law and employee benefit plan are involved. Only after the existence of a plan and a state law are established does one begin NELA's analysis.

law in an area of traditional state regulation is not preempted, *Travelers*, 115 S. Ct. at 1671, unless the state law directly regulates an ERISA-governed relationship, *see, e.g, Airparts Company, Inc. v. Custom Benefit Services of Austin*, 28 F.3d 1062 (10th Cir. 1994); *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), or the state law accomplishes through an acute indirect economic effect what it cannot do directly, that is, regulate ERISA plans. *See Travelers*, 115 S. Ct. at 1683.

Adoption of such a framework will serve to produce more uniformity in the interpretation of the phrase "relates to an employee benefit plan," to implement Congress' intent in enacting ERISA's preemption clause, and to decrease the number of preemption cases and claims flowing into the federal courts.

Applying this framework to the facts of this case, the New York state law taxing gross receipts from patient care services and general operations of all hospitals in New York does not directly conflict with ERISA, does not duplicate an ERISA claim under ERISA § 502(a), does not reference an ERISA plan, and is a state law in an area of traditional state regulation that neither directly regulates an ERISA-governed relationship nor produces an acute indirect economic effect. Thus, the state law does not "relate to an employee benefit plan", and it is not preempted under ERISA §514(a), 29 U.S.C. § 1144(a).

ARGUMENT

I. THE COURT SHOULD DEVELOP A MORE WORKABLE FRAMEWORK FOR ANALYZING ERISA'S PREEMPTION CLAUSE TO ACHIEVE CONGRESS' INTENT OF UNIFORM ADMINISTRATION OF EMPLOYEE BENEFIT PLANS.

Although the Court has attempted to provide guidance in the area of ERISA preemption,[2] the lower courts are continuing to struggle with the boundaries of ERISA's preemption clause, particularly with the meaning of the phrase "relates to an employee benefit plan."[3] *Memorial Hospital System v. Northbrook Life Ins.*

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[2] *E.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

[3] *See District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 135 n.3 (1992) (Steven J., dissenting) (noting that in December 1992, there were 2800 cases on LEXIS addressing ERISA preemption); *HealthAmerica v. Menton*, 555 So. 2d 235, 241 (Ala. 1989), *cert. denied*, 493 U.S. 1093 (1990) (White and O'Connor, JJ., dissenting to denial of *certiorari*); *see generally* C. L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 58-59 (1996) (footnotes omitted) ("The relatively large number of ERISA preemption opinions has not, however, led to clarity in the law. The lower courts have decided thousands of preemption cases, yet remain mired in confusion about basic points."); S. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the* (continued...)

Co., 904 F.2d 236, 244 (5th Cir. 1990). Indeed, more than one judge has expressed frustration with ERISA preemption and its impact. *See, e.g., United Wire and Machine Health and Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1197 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 382 (1993) (Nygaard, J. dissenting) ("ERISA could become a legal black hole with an attractive force no state law could resist."); *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 827 (N.D. Ala. 1988) ("The ERISA quicksand is fast swallowing up everything that steps in it or near it. This morass serves as the stage for a theater of the absurd."). And, this Court recently acknowledged its own frustration in its attempts to provide detailed guidance concerning ERISA preemption, *Travelers*, 115 S. Ct. at 1676, mainly because ERISA's preemption clause is not a "'model of legislative drafting and the legislative history . . . is sparse.'" *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99 (*citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (*quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

This Court's own experience with ERISA preemption illustrates the lower courts' struggle. The Court has issued twelve decisions on this issue, even though ERISA has been in effect for only twenty-one years. Roughly half of the cases which the Court has decided concerning ERISA have been preemption cases.[2] This term alone the Court has granted *certiorari* in three ERISA preemption cases.

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[3](...continued)
Courts?, 40 VILL L. REV. 1, 18 n. 42 (1995) (detailing the volume of cases and law review articles on ERISA preemption).

[2] C. L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 58-59 (1996), *cited with approval in Morstein v. National Ins. Services, Inc.*, 93 F.3d 715, 719 n. 7 (11th Cir. 1996).

Significantly, the federal courts are being inundated with preemption defenses in cases that have little to do with uniform administration of employee benefit plans or the protections offered by ERISA. This torrent of cases is due to the vague statutory language concerning the limits of ERISA's preemption clause and the perception that ERISA preemption can be used as both a sword and a shield to prevent participants from pursuing *bona fide* claims. *SeeRokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996). ERISA's "unhelpful text" has resulted in a lack of uniformity on this issue, certainly undercutting Congress' objective in obtaining uniform administration of employee benefit plans and safeguarding participants' benefits. *Travelers*, 115 S. Ct. at 1677-78; *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989). In order to produce more uniformity in the application of ERISA's preemption clause and to decrease the number of preemption cases in the federal courts, NELA respectfully suggests the adoption of a framework for analyzing ERISA preemption cases, which includes a more precise test for determining when a state law "relates to an employee benefit plan."

II. NEW YORK STATE'S LAW TAXING HOSPITALS IS NOT PREEMPTED BY ERISA BECAUSE THE LAW DOES NOT DIRECTLY CONFLICT WITH ERISA, DOES NOT DUPLICATE A CLAIM UNDER ERISA § 502, DOES NOT REFERENCE AN ERISA PLAN, AND IS A STATE LAW IN A TRADITIONAL AREA OF STATE REGULATION THAT NEITHER REGULATES AN ERISA-GOVERNED RELATIONSHIP NOR PRODUCES AN ACUTE INDIRECT ECONOMIC EFFECT.

A. ERISA Preemption Analysis Must Be Grounded In The Presumption That A State Law Is Not Preempted Unless Congress' Intent To Do So Is Clear.

ERISA preemption analysis is no different than any other preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99 ("we discern no solid basis for believing that, Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"). As with other statutes, the Court has cautioned that, in order to avoid unintentionally encroaching on state authority, courts should be reluctant to find preemption when interpreting a federal statute. *Travelers*, 115 S. Ct. at 1676; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the State [are] not to be superseded by...[federal law]"). Accordingly, "'the purpose of Congress is the ultimate touchstone of preemption analysis.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))); *see* U.S. CONST. art. VI, cl. 2.

"To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). Congress explicitly stated its intent to preempt state laws in the statutory language of ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the

statute. However, the language of ERISA § 514(a) does not provide a clear statement of how far Congress intended preemption to reach.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), the Court explained that state law relates to an employee benefit plan "if it has a connection with or reference to such a plan." Nevertheless, the Court admonished that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n. 21. It follows that "relates to" must have some limitation, otherwise it "would never run its course." *Travelers*, 115 S. Ct. at 1677. To hold otherwise would be inconsistent with the presumption against preemption absent a clear indication of Congressional intent to do so, in order that state law is given the fullest effect possible. *Travelers*, 115 S. Ct. at 1676-78; *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 841 (1988).

In *Travelers*, 115 S. Ct. at 1677-78, the Court reviewed ERISA's structure and purpose to determine the purpose of the preemption clause and the limits of "relates to." The Court concluded that "the basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* Although the Court reiterated the presumption against preemption of state laws, the Court did not set forth any other framework for analyzing ERISA preemption. Consequently, this case and the others upon which *certiorari* has been granted presents the Court with the opportunity to establish a more workable framework for analyzing ERISA preemption cases including a more precise test for determining the boundaries of the phrase "relates to an employee benefit plan" in ERISA's preemption clause.

B. If A State Law Directly Conflicts With ERISA, It Must Be Preempted.

Under traditional preemption analysis, any state law that directly conflicts with a federal law, either on its face or in application, must be preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. Accordingly, state laws that (1) regulate the types of benefits or terms of a plan, *e.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (workers' compensation law prohibiting termination of health benefits of workers receiving workers' compensation benefits is preempted); (2) create specific requirements as to funding, reporting and disclosure, vesting, and the like, *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978) (state law regulating funding and disclosure requirements of ERISA plans is preempted); and (3) establish rules for the calculation of benefits, *e.g., FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (interference with calculation of benefits through state antisubrogation statute); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (prohibition of offset of workers' compensation benefits against retirement benefits are preempted) are preempted. *See generally Airparts Company, Inc. v. Custom Benefit Services of Austin*, 28 F.3d 1062, 1064-65 (10th Cir. 1994); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 553 (5th Cir. 1990), *cert. denied*, 497 U.S. 1024 (1990). These laws directly regulate ERISA plans and must be preempted. *Cf. Travelers*, 115 S. Ct. at 1683 (recognizing that laws having direct effects on plans are generally preempted).

NELA suggests that a determination whether the state law directly conflicts with ERISA should be the first step in any preemption analysis. If a state law conflicts with any provision of ERISA, then the state law is preempted and preemption analysis ends.

In this case, the New York law does not directly conflict with any provision of ERISA by regulating benefits, the terms of a plan, or calculation of benefits, or by creating any specific requirements

as to funding, reporting, disclosure, vesting, and the like, and we must go on to the next step of the preemption analysis.

C. If A State Law Claim May Be Brought Under ERISA §502(a), Then Such Claim Is Necessarily Preempted By ERISA § 514(a).

Where a state law claim can be brought under ERISA § 502(a) and thus is completely preempted under that section, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), it is necessarily preempted under ERISA § 514(a). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (state law claim for bad faith denial of benefits preempted under ERISA § 514(a) because it would displace exclusive remedies under ERISA § 502(a)); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (state law action supplanted by ERISA § 510 as enforced via ERISA § 502(a) when ERISA offers same remedies).[10]

NELA suggests that a determination of whether a state law claim may be brought under ERISA § 502(a) should be the second step in the preemption analysis. If a state law claim may be brought under ERISA § 502(a), then it is preempted, and no additional preemption analysis is needed.

In this case, ERISA § 502(a) does not provide the State of New York with a cause of action to collect a tax, and thus the preemption analysis must continue.

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[10] Under this framework, the preemption analysis in *Ingersoll-Rand* and *Pilot Life* would end here. There would be no need to rely on a more general interpretation of ERISA § 514(a) as a basis for preemption.

D. Where A State Law Specifically Refers To An ERISA Plan, The State Law Relates To An Employee Benefit Plan And Is Preempted.

State laws that specifically reference ERISA plans are preempted to the extent they regulate ERISA plans. *Shaw*, 463 U.S. at 96-97. *Accord, District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted"); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988) (a garnishment statute singling out ERISA plans for special treatment was held preempted, but the general garnishment statue was not preempted as applied to ERISA plans).

Thus, if a state law survives both conflict and complete preemption analysis (*see* II, B and II, C, *supra*), but specifically refers to an ERISA plan, it is preempted, and preemption analysis ends.

In this case, New York's law does not specifically reference ERISA plans, and we must proceed to the next step of the preemption analysis.

E. It Must Be Presumed That A State Law In An Area of Traditional State Regulation Is Not Preempted.

In analyzing preemption cases, the Court has consistently stated that state law is not to be preempted unless Congress' intent to do so is clear. *Travelers*, 115 S. Ct. at 1676; *Rice v. Santa Fe Elevator Corp.*, *supra* (the historic police powers of the State [are] not to be superseded by...[federal law]"); *Cipollone v. Liggett Group, Inc.*, *supra*. However, over the twenty-one years courts have interpreted ERISA's preemption clause, this presumption has been turned on its head. Instead, for many courts, the presumption has been that ERISA preempts state law claims.

It is clear that federal law generally should not have any preemptive effect on areas that states have historically regulated as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Slaughter-House Cases*, 33 U.S. 36, 16 Wall. 36, 62 (1872), *quoting Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855). These include: regulation of hospital costs, *Travelers*, 115 S. Ct. at 1681; "child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . ", *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); laws abolishing or modifying the common law doctrines of common employment and assumption of the risk, *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463 (1908); laws prescribing mandatory state holidays, payment for jury duty or time spent voting, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); legal malpractice claims, *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996); escheat of abandoned property, *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989); and enforcement of commercial contracts under common law, *Zuniga v. Blue Cross & Blue Shield of Michigan*, 52 F.3d 1395 (6th Cir. 1995). These laws concern issues that the states have historically regulated. This Court has made it clear that the states should be able to continue to regulate in these areas, unless there is clear Congressional intent to the contrary. *Travelers*, 115 S. Ct. at 1676.

Accordingly, a state law in an area of traditional state regulation will generally not be preempted unless it directly regulates an ERISA-governed relationship or attempts to do through indirect economic effect what it cannot do directly.

In this case, regulation of health care providers is a traditional exercise of state authority, *See Travelers*, 115 S. Ct. at 1676. Preemption analysis must continue with a presumption that the state law is not preempted.

F. If A State Law Regulates An ERISA-Governed Relationship, It Is Preempted.

State laws that regulate an ERISA-governed relationship -- between the plan and participants, the plan and the fiduciaries, the plan and the sponsoring employer, the fiduciaries or plan administrator and the participants, or the fiduciaries and the plan administrator[11/] -- will generally relate to an employee benefit plan, and therefore will be preempted. *Morstein v. National Ins. Services, Inc.*, 93 F.3d 715, 722-23 (11th Cir. 1996) (*en banc*); *Boyle v. Anderson*, 68 F.3d 1093, 1103 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1266 (1996); *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1533-34 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 335 (1995); *Travitz v. Northeast Dept. ILGWU Health & Welfare* Fund, 13 F.3d 704, 709 (3d Cir.), *cert. denied*, 114 S.Ct. 2165 (1994); *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993); *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341,1344-45 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 249 (5th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467-68 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *cf. Pilot Life v. Dedeaux*, 481 U.S. at 53-54 (relationship between plan administrator and participant). State laws regulating these relationships are particularly likely to interfere with ERISA's regulatory scheme, and are presumptively preempted. *General American Life Ins. Co. v. Castonguay*, 984 F.2d at 1521-22.

11/ The relationship between the employer and employee is not an ERISA-governed relationship because that relationship concerns the employment relationship, not a relationship growing out of benefits. *Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1406-07 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 906 (1995). *cf. Variety Corp. v. Howe, supra* (where employer is held to be acting as a fiduciary, state law claims would be preempted).

Conversely, if the state law does not regulate an ERISA-governed relationship, it will not be preempted. For example, if the state law only regulates one of the principal ERISA entities, then there is no relationship, and there is no preemption. *Hospice of Metro Denver, Inc. v. Group Health Ins. of Okla., Inc.*, 944 F.2d 752, 753 (10th Cir. 1991) (a law affecting the relations between an ERISA entity and an outside party is not preempted). Quite simply, if there is no regulation of an ERISA-governed relationship, more likely than not, there will be no significant effect on the structure, administration, or the type of benefits provided by the plan. *Id.*

Moreover, if the principal ERISA entities are not being regulated in their ERISA capacities, then there is no ERISA-governed relationship. *Cf. John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. at 106 (where an insurance company is acting as an investment manager the insurance company must comply with fiduciary standards). Thus, "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are against the plan in a capacity other than as a plan – *i.e.*, as a commercial entity – and are not preempted. *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 833 (1988). None of these claims concern the plan acting as an ERISA plan – that is, these claims do not impact plan administration or the payment of benefits. Where the plan is acting like a commercial entity and not like an ERISA plan, it should be treated the same as any commercial entity. *Id.; General American Life Ins. Co. v. Castonguay*, 984 F.2d at 1521-22.

This part of NELA's suggested framework is consistent with the Court's admonition in *Shaw*, because when a state law concerns a third party and therefore does not regulate an ERISA-governed relationship, the effect on employee benefit plans will be too tenuous or peripheral to find that it relates to a plan. Moreover, this prong is also consistent with Congress' objective to avoid multiplicity of regulation; obviously if a state law does not regulate an ERISA-governed relationship, there will not be duplicative regulation. *Travelers*, 115 S. Ct. at 1677-78. As a corollary, this

analysis is consistent with the presumption against preemption of state laws unless Congress' intent to do so is clear. *Id.* Finally, adoption of this part of NELA's suggested analysis will not require overturning any precedent; application of this test to past ERISA preemption cases would result in outcomes consistent with those decisions.

This analysis requires asking whether the state law reaches an ERISA-governed relationship -- that is, a relationship already regulated by ERISA. Accordingly, claims made against an employer in its corporate, rather than its fiduciary capacity, would not relate to employee benefit plans and would not be preempted. *Cf. Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2523 (1996) (decision to terminate plan is made in corporate capacity and thus claims are not preempted). A state law requiring a hospital to collect a surcharge from a participant would not be preempted because it regulates the hospital and the plan or its participants, and there is no ERISA-governed relationship. *Travelers*, 115 S. Ct. at 1680. Claims for medical malpractice against doctors would not be preempted because the doctor is not one of the principal ERISA entities. *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995). An individual's claim against an insurance agent and agency for fraudulent inducement to purchase and negligence in processing the application for an ERISA-governed insurance plan is not preempted because the relationship between the non-fiduciary agent (and agency) and the employee is not regulated by ERISA. *Morstein v. National Ins. Services, Inc.*, 93 F.3d 715, 722-23 (11th Cir. 1996) (*en banc*). A plan's malpractice claims against a service provider such as an attorney or actuary are not preempted because no ERISA-governed relationship is involved; the service provider is a non-fiduciary. *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996). Mere inclusion of a request for fringe benefits to fully compensate an employee for a wrongful discharge, otherwise unconnected to an employee benefit plan, would not be preempted because the crux of the claim is the wrongful termination of employment. *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1406-07 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 906 (1995).

In *Boyle v. Anderson*, 68 F.3d 1093, the court reviewed a state statute similar to the one at issue in this case. The court found that the MinnesotaCare provider tax, permitting a health care provider to transfer the expense of a 2% provider tax to third party health care providers, did not change the structure or terms of the plan. Nor did it result in any alternation in the power or authority among the primary ERISA entities. Consequently the court held that these factors, among others, warranted a finding that the tax was not preempted.

Accordingly, NELA suggests that this prong of ERISA preemption analysis should be an inquiry as to whether the state law regulates an ERISA-governed relationship.[12]

In this instance, the New York state law does not regulate any ERISA-governed relationship. It does not regulate the relationship between the plan and its participants. It does not regulate the

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[12] A number of courts of appeals have formulated similar tests focusing on "principal ERISA entities" -- plan, participant, fiduciary, and employer. *Morstein v. National Ins. Services, Inc.*, 93 F.3d 715, 722-23 (11th Cir. 1996) (*en banc*); *Boyle v. Anderson*, 68 F.3d 1093, 1103 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1266 (1996); *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1533-34 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 335 (1995); *Travitz v. Northeast Dept. ILGWU Health & Welfare* Fund, 13 F.3d 704, 709 (3d Cir.), *cert. denied*, 114 S.Ct. 2165 (1994); *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993); *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341,1344-45 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 249 (5th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467-68 (5th Cir. 1986), *cert. denied*, 479 US 1034 (1987). While these tests are helpful in clarifying that cases involving third-parties are not preempted, they fail to recognize that employers and employees "wear more than one hat," that is, the employer has a relationship with the employee outside of its possible fiduciary role, which relationship has been regulated historically by the states. *E.g., DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

relationship between the plan and the trustees. It does not regulate the relationship between the plan and the employer. It does not regulate the relationship between the participants and the trustees. New York's tax does not affect a participant's benefit eligibility or the calculation of benefits. Instead, it only regulates the plan in its commercial capacity as a health care provider. *See Travelers*, 115 S. Ct. at 1680. Consequently, under this prong of the analysis, New York state's law is not preempted.

G. If A State Law Accomplishes Through A Severe Indirect Economic Effect What It Could Not Do Directly, It Is Preempted.

As the final prong of preemption analysis, an inquiry must be made to ensure that the state is not accomplishing indirectly what it cannot do directly.

A state law taxing, or otherwise indirectly attempting through economics to effect, an ERISA plan generally will not be preempted because the economic effect will be so indirect that there will not be the requisite connection to an ERISA plan. *Travelers*, 115 S. Ct. at 1680. However, there may be instances where "a state law . . . produce[s] such acute, albeit indirect, economic effects . . . to force an ERISA plan to adopt a certain scheme of substantive coverage" or administration that the state law will be preempted. *Travelers*, 115 S. Ct. at 1683.

Thus, where the state law's indirect economic effect is so significant that it demonstrably and of necessity causes the plan to choose certain types of benefits; to change its terms; to create specific requirements as to funding, reporting and disclosure, vesting, and the like; or to establish rules for the calculation of benefits; or if the effect is to regulate an ERISA-governed relationship, it must be preempted. *See* II, B, and II, F, *supra*.

In this case, the New York state law's economic effect on ERISA plans is negligible, and thus is not preempted.

H. New York State's Law Taxing Gross Receipts From Patient Care Services Is Not Preempted Under Any Of The Steps In NELA's Suggested Framework For Analyzing ERISA Preemption Cases.

Accordingly, under NELA's suggested analysis, New York State's law taxing gross receipts from patient care services and general operations of all hospitals in New York does not directly conflict with ERISA, does not duplicate an ERISA claim under ERISA § 502(a), does not reference an ERISA plan, and is a state law in an area of traditional state regulation that does not directly regulate an ERISA-governed relationship and does not produce an acute demonstrable indirect economic effect on an ERISA plan. Thus, the state law does not "relate to an employee benefit plan", and it is not preempted under ERISA § 514(a), 29 U.S.C. § 1144(a).

CONCLUSION

For the foregoing reasons, NELA urges the Court to reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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